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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Francine M Arthur,

10 Plaintiff,

11 v.

12 Windsor Shadows Homeowner's
13 Association,

14 Defendant.

No. CV-20-00435-PHX-DJH

ORDER

15 Pending before the Court are *pro se* Plaintiff's and Defendant's motions for
16 summary judgment (Docs. 103; 104). These matters are fully briefed. Also bending before
17 the Court are several motions filed by Plaintiff, including a Motion to Compel (Doc. 82),
18 a Motion for Leave to File Sur-Reply (Doc. 108), and two motions to supplement (Docs.
19 111; 112). For the reasons explained below, the Court grants Defendant's Motion for
20 Summary Judgment.

21 **I. Background**

22 Plaintiff Francine Arthur's Second Amended Complaint ("SAC") (Doc. 56) brings
23 five causes of action against Defendant Windsor Shadows Homeowner's Association.
24 Generally, the SAC alleges that Plaintiff lives in the Windsor Shadows community and that
25 she has been harmed by Defendant. It is not exactly clear what these causes of action are
26 because Plaintiff cites multiple statutes under the same cause of action. However, the Court
27 infers that the claims are for the following: Count One alleges discrimination under the
28 Fair Housing Act ("FHA"); Count Two alleges a violation of Arizona's Fair Housing Act

1 (“AFHA”); Count Three alleges harassment under A.R.S. § 13-2921; Count Four alleges a
 2 breach of the covenant of quiet enjoyment; Count Five alleges Defendants breached a
 3 fiduciary duty. (Doc. 56 at 92–185); *see also Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir.
 4 2010) (noting that courts must construe pro se pleadings liberally).

5 **II. Motion to Compel (Doc. 82)**

6 Before proceeding to the motions for summary judgment, the Court notes that it has
 7 not yet ruled on Plaintiff’s Motion Compel (Doc. 82). The Court ordered the parties to
 8 meet and confer on the subject matter of the Motion. (Doc. 86). And the Court held a
 9 hearing on the matter and ordered Plaintiff to narrow the scope of her interrogatories and
 10 it ordered Defendant to respond. (Doc. 92). In doing so, the Motion to Compel can be said
 11 to have been granted in part and denied in part.

12 **III. Plaintiff’s Request for Additional Filings (Docs. 108; 111; 112)**

13 Plaintiff has filed a Motion for Leave to File Sur-Reply (Doc. 108) to demonstrate
 14 that she is disabled and that she is considered the owner under Defendant’s covenants,
 15 conditions, and restrictions (“CC&Rs”). Defendant does not oppose this Motion, and the
 16 Court grants it.

17 Plaintiff has also filed a Motion to Supplement (Doc. 111), which seeks to admit a
 18 photograph of the ramp in someone’s yard “being used for skateboard jumping” The
 19 other Motion to Supplement contains a photograph, which Plaintiff claims shows a
 20 landscaper conducting surveillance on her house. (Doc. 112). The Court denies these
 21 motions as untimely and because Plaintiff does not explain why they could not have been
 22 submitted earlier with the summary judgment motion briefing.

23 **IV. Motion for Summary Judgment Standard**

24 A court will grant summary judgment if the movant shows there is no genuine
 25 dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R.
 26 Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A factual dispute is
 27 genuine when a reasonable jury could return a verdict for the nonmoving party. *Anderson*
 28 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Here, a court does not weigh evidence

1 to discern the truth of the matter; it only determines whether there is a genuine issue for
 2 trial. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1131 (9th Cir. 1994). A fact is
 3 material when identified as such by substantive law. *Anderson*, 477 U.S. at 248. Only
 4 facts that might affect the outcome of a suit under the governing law can preclude an entry
 5 of summary judgment. *Id.*

6 The moving party bears the initial burden of identifying portions of the record,
 7 including pleadings, depositions, answers to interrogatories, admissions, and affidavits,
 8 that show there is no genuine factual dispute. *Celotex*, 477 U.S. at 323. Once shown, the
 9 burden shifts to the non-moving party, which must sufficiently establish the existence of a
 10 genuine dispute as to any material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio*
 11 *Corp.*, 475 U.S. 574, 585–86 (1986). The evidence of the non-movant is “to be believed,
 12 and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255. But
 13 if the non-movant identifies “evidence [that] is merely colorable or is not significantly
 14 probative, summary judgment may be granted.” *Id.* at 249–50 (citations omitted).

15 **V. Discussion**

16 The Court will proceed through each of the SAC’s claims in turn.

17 **a. Discrimination Under the FHA**

18 Under the FHA, it is unlawful to “discriminate against any person in the terms,
 19 conditions, or privileges of sale or rental of a dwelling, or in the provision of services or
 20 facilities in connection therewith, because of race, color, religion, sex, familial status, or
 21 national origin.” 42 U.S.C. § 3604(b). Courts employ a Title VII discrimination analysis
 22 when examining FHA claims, whereby a plaintiff can base her theory of discrimination on
 23 “a theory of disparate treatment or disparate impact.” *Budnick v. Town of Carefree*, 518
 24 F.3d 1109, 1114 (9th Cir. 2008). Because Plaintiff argues that Defendant has selectively
 25 enforced its CC&Rs, the Court infers Plaintiff brings a discrimination claim based on
 26 disparate treatment. (Doc. 103 at 11).

27 To bring a disparate treatment discrimination claim under the FHA, a plaintiff must
 28 first show that she has been treated differently than others. *See McDonnell Douglas Corp.*

1 *v. Green*, 411 U.S. 792, 802 (1973); *Pack v. Fort Washington II*, 689 F. Supp. 2d 1237,
 2 1243 (E.D. Cal. 2009). During her deposition testimony, Plaintiff only identified a
 3 neighbor, Allen Lay, as an individual who was treated differently because she claimed that
 4 he had some of his debts to Defendant forgiven. (Doc. 104-5 at 15). She claims that the
 5 debts she owned to Defendant have not been forgiven due to her race and disabilities. (Doc.
 6 56 at ¶¶ 103, 113). Plaintiff has not produced any admissible evidence to support her claim
 7 that Allen Lay's debt was forgiven.¹ Defendant has produced the transaction history for
 8 the housing unit where Allen Lay lives, and it does not show any debt was forgiven. (Doc.
 9 104-10). The Court finds that Plaintiff's testimony to the contrary is insufficient to create
 10 a genuine issue of fact.

11 To some extent, Plaintiff also argues that she has been discriminated against because
 12 of her a ramp that she uses for a mobility scooter. (Doc. 56 at ¶ 98). However, Plaintiff
 13 admits in her deposition that she has never received a written complaint from Defendant
 14 about the ramp. (Doc. 104-5 at 11). There is no evidence in the record that Defendant took
 15 any adverse action against Plaintiff because of the ramp. Plaintiff alleges that she was
 16 discriminated against because a landscaper mistook her ramp for a skateboard ramp. (Doc.
 17 56 at ¶ 98). But the Court finds that this statement does not create a genuine issue showing
 18 that Defendant discriminated against her because of her disability.

19 Because Plaintiff has not produced any evidence that she is being treated differently
 20 than others the Court will enter judgment in Defendant's favor for Count One.

21 **b. Violation of AFHA**

22 Like the FHA, the AFHA prohibits discrimination "in the provision of services of
 23 facilities in connection with" a dwelling because of a person's race or disability. A.R.S. §§
 24 41-1491.14(B); 41-1491.19(B). Arizona courts have noted that the AFHA is "virtually
 25 identical" to the FHA. *Canady v. Prescott Canyon Ests. Homeowners Ass'n*, 60 P.3d 231,

26 ¹ The Court notes Plaintiff submitted a declaration from Scott Winters, who states that he
 27 was told by an unnamed former board member that the debt was forgiven. (Doc. 40-10 at
 28 6). But this is an out of court statement offered to prove that the debt was forgiven, and it
 constitutes inadmissible hearsay. Fed. R. Evid. 802. Courts may not consider inadmissible
 evidence on a motion for summary judgment. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764,
 773 (9th Cir. 2002).

233 (Ariz. Ct. App. 2002). Because Plaintiff fails to show any discrimination for purposes of the FHA claim, her AFHA claim also fails. The Court must enter judgment in Defendant's favor for Count Two.

c. Harassment

Plaintiff cites both 24 C.F.R. § 100.7(a)(iii) and A.R.S. § 13-2921 as the basis for her harassment claim. (Doc. 56 at 38). To the extent this claim is based on racial discrimination, it fails because there is no evidence of racial discrimination in the record. It also fails because neither source of law that Plaintiff cites provides a basis for a civil cause of action. 24 C.F.R. § 100.7 is a regulation related to the FHA and not a separate cause of action from what the FHA already provides. A.R.S. § 13-2921 is part of Arizona's criminal statute defining what constitutes harassment against any person or public official, and it does not contain an explicit private cause of action. Furthermore, "no private cause of action should be inferred based on a criminal statute where there is no indication whatsoever that the legislature intended to protect any special group by creating a private cause of action by a member of that group." *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 877 P.2d 1345, 1350 (Ariz. Ct. App. 1994). The Court declines to infer a private cause of action here because Plaintiff has nowhere argued that she is a member of a special group, such as a public official, with a right to a private cause of action.

Because there is no valid cause of action under Count Three, the Court will dismiss Count Three with prejudice because Plaintiff could not obtain any relief. *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (stating that courts may dismiss claims sua sponte when a "claimant cannot possibly win relief").

d. Breach of Covenant of Quiet Enjoyment

Under Arizona law, there is an implied covenant of quiet enjoyment whereby "a tenant will be free from any interference on the part of the landlord." *Comerica Bank v. Cactus & Tatum, L.L.C.*, 2010 WL 2299086, at *2 (Ariz. Ct. App. June 8, 2010) (cleaned up). As Plaintiff concedes, the home where she lives was owned by her mother, and when her mother passed it was placed in a trust. (Doc. 104-5 at 12). Michael and Richard Harms

1 are the trustees. (*Id.*) There is nothing in the record showing that Plaintiff is a tenant or
 2 that Defendant is a landlord. In fact, Plaintiff herself argues she is the beneficiary of the
 3 trust and is considered the owner of the home under the CC&Rs. (Doc. 105 at 10).
 4 Therefore, there is now showing that Plaintiff is a tenant or that Defendant is a landlord.
 5 The Court will enter judgment in Defendant's favor for Count Four.

6 **e. Breach of Fiduciary Duty**

7 Plaintiff's final claim generally alleges that Defendants fraudulently enforced a lien
 8 on the home where Plaintiff lives. (Doc. 56 at ¶ 161). Beyond this, however, the Court is
 9 unable to discern what breach or fraudulent activity Plaintiff claims Defendant engaged in.
 10 Defendant simply argues that Plaintiff fails to make a prima facie claim for breach of
 11 fiduciary duty or fraud without explaining what possible theory Plaintiff might recover on.
 12 (Doc. 104 at 12–14). Plaintiff does not clarify what this alleged breach consists of, but she
 13 does mention that the Defendant "misplaced" some payments that she made to it. (Doc.
 14 105 at 49). Plaintiff attaches lengthy strings of emails to her Motion for Summary
 15 Judgment in which she claims that Defendant misplaced \$1,000. (*See e.g.* Doc. 40-1). But
 16 these emails do not show that \$1,000 was misplaced, only that Plaintiff claims they are.
 17 The Court cannot, therefore, find any facts showing a breach of any duty or fraud on
 18 Defendant's behalf. The Court will enter judgment in Defendant's favor for Count Five.

19 **VI. Conclusion**

20 The Court will grant summary judgment in Defendants favor for all of the SAC's
 21 claims, except for Count Three, which the Court dismisses with prejudice for failing to
 22 state a claim.

23 Accordingly,


24 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Compel (Doc. 82) is
 25 **granted** in part and **denied** in part. Plaintiff's Motion for Leave to File Sur-Reply (Doc.
 26 108) is **granted**. Plaintiff's motions to supplement (Docs. 111; 112) are **denied**.

27 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Summary Judgment
 28 (Doc. 103) is **denied**.

1 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment
2 (Doc. 104) is **granted** in part as set forth in this Order. The Clerk of Court shall enter
3 judgment in Defendant's favor for Counts One, Two, Four, and Five. The Court dismisses
4 Count Three with prejudice for failing to state any claim for relief.

5 **IT IS FINALLY ORDERED** that the Clerk of Court shall terminate this action.

6 Dated this 6th day of July, 2022.

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10 Honorable Diane J. Humetewa
11 United States District Judge
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